Corporate Spirit Sdn Bhd v Chaw Kock Kaw @ Chow Kok Kow

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–88–01 OF 2012
HISHAMUDIN YUNUS, LINTON ALBERT AND UMI KALTHUM JJCA
30 SEPTEMBER 2016

Land Law — Sale of land — Termination — Appellant and respondent entered into sale and purchase agreement ('SPA') — Appellant defaulted in payment of balance of purchase price — Respondent terminated SPA and commenced action for injunction and damages — Appellant counterclaimed for specific performance of the SPA — Trial court allowed respondent's claim and dismissed appellant's counterclaim — Whether SPA ought to be treated as one contemporaneous transaction with three other sale agreements executed between appellant and company under respondent's directorship — Whether failure to pay balance of purchase price constituted fundamental breach — Whether appellant entitled to specific performance

The appellant entered into a sale and purchase agreement ('the SPA') with the respondent for the purchase of a piece of land located in Sandakan, Sabah owned by the respondent ('the said property'). The appellant had paid half of the purchase price and according to the SPA, the balance of purchase price was to be paid within three months from the date of the SPA with the availability of one month extension subject to 8% interest per annum. The appellant had failed to pay the balance of purchase price within the stipulated time, thus the respondent terminated the SPA and commenced an action against the appellant for injunction and damages. In response, the appellant counterclaimed for specific performance of the SPA. The trial court allowed the respondent's claim and dismissed the appellant's counterclaim, hence this appeal. The appellant contended that the SPA ought to be treated as one contemporaneous transaction with the other three sale agreements of land with a company known as Layar Positif Sdn Bhd ('Layar Positif') whereby the respondent was one of the directors in the said company. The appellant submitted that the balance of purchase price could not have been paid because the other three sale agreements were not ready for completion due to Layar Positif's failure to fulfill the special conditions.

Held, dismissing the appellant's appeal with costs of RM20,000 and affirming the decision of the High Court:

(1) Although the SPA and the other three sale agreements were executed simultaneously between Layar Positif and the appellant, they did not form as one single transaction. The SPA was entered into by the respondent and the appellant whereas the other three sale agreements were entered into between the appellant and Layar Positif. It is trite law that the respondent and Layar Positif were different legal entities. Further, the absence of references to the three sale agreements in the SPA only served to prove that it was never the intention of the parties to treat them as contemporaneous and as one single transaction (see paras 36 & 40).

(2) The failure of the appellant in paying the balance of the purchase price of the said property in accordance with the cll 4(2), 5 and 22 of the SPA tantamount to a fundamental breach of the SPA which entitled the respondent to terminate the SPA. The respondent was legally entitled to repossess the said property and to charge late payment interest of 8%pa in accordance with cll 9 and 16 of the SPA. Further, the respondent was also entitled to claim for compensation and damages for any losses incurred (see paras 42–44 & 46).

(3) It is trite law that in seeking for an equitable relief such as specific performance, one must first fulfil one's obligation, if any. The fundamental breach of the appellant in failing to pay the balance of the purchase price as per the SPA must consequently render his counterclaim for a specific performance to fail (see para 47).

[Bahasa Malaysia summary

Perayu telah memeterai perjanjian jual beli ('PJB') dengan responden untuk membeli sebidang tanah yang terletak di Sandakan, Sabah yang dimiliki oleh responden ('hartanah tersebut'). Perayu telah membayar separuh daripada harga belian dan menurut PJB, baki harga belian hendaklah dibayar dalam tempoh tiga bulan dari tarikh PJB dengan adanya lanjutan satu bulan tertakluk kepada 8% faedah setahun. Perayu gagal untuk membayar baki harga belian dalam tempoh yang ditetapkan, oleh itu responden menamatkan PJB dan memulakan suatu tindakan terhadap perayu untuk injunksi dan ganti rugi. Sebagai balasan, perayu membuat tuntutan balas untuk pelaksanaan spesifik PJB. Mahkamah perbicaraan membenarkan tuntutan responden dan menolak tuntutan balas perayu, oleh itu rayuan ini dibuat. Perayu berhujah bahawa PJB tersebut sepatutnya dianggap sebagai satu transaksi sezaman dengan tiga perjanjian penjualan tanah yang lain dengan syarikat yang dikenali sebagai Layar Positif Sdn Bhd ('Layar Positif') di mana responden merupakan salah seorang pengarah dalam syarikat tersebut. Perayu berhujah bahawa baki harga belian tidak boleh dibayar kerana tiga perjanjian penjualan yang lain tidak sedia untuk dilaksanakan disebabkan kegagalan Layar Positif untuk memenuhi syarat-syarat khas.

Diputuskan, menolak rayuan perayu dengan kos sebanyak RM20,000 dan mengesahkan keputusan Mahkamah Tinggi:

(1) Walaupun PJB dan tiga perjanjian jualan lain dimeterai serentak antara Layar Positif dan perayu, perjanjian tersebut tidak membentuk satu transaksi tunggal. PJB dimeterai oleh responden dan perayu manakala tiga perjanjian penjualan lain dimeterai antara perayu dan Layar Positif. Undang-undang yang terpakai adalah bahawa responden dan Layar Positif merupakan entiti undang-undang yang berbeza. Selanjutnya, ketiadaan rujukan kepada tiga perjanjian jualan dalan PJB hanya dapat membuktikan bahawa bukanlah niat pihak-pihak untuk menganggap perjanjian tersebut sebagai sezaman dan sebagai satu transaksi tunggal (lihat perenggan 36 & 40).

(2) Kegagalan perayu untuk membayar baki harga belian hartanah tersebut menurut klausa 4(2), 5 dan 22 PJB bersamaan dengan pelanggaran asas PJB yang memberikan hak kepada responden untuk menamatkan PJB. Responden berhak di sisi undang-undang untuk memiliki semula hartanah tersebut dan mengenakan faedah pembayaran lewat sebanyak 8% setahun mengikut klausa 9 dan 16 PJB. Seterusnya, responden juga berhak untuk menuntut pampasan dan ganti rugi untuk apa-apa kerugian yang ditanggung (lihat perenggan 42–44 & 46).

(3) Undang-undang terpakai adalah bahawa dalam mencari relief ekuiti seperti pelaksanaan spesifik, seseorang itu perlu memenuhi kewajipannya, jika ada. Pelanggaran asas perayu dalam kegagalannya untuk membayar baki harga belian menurut PJB sebagai akibatnya menjadikan tuntutan balasnya untuk perlaksanaan spesifik gagal (lihat perenggan 47).]

Notes

For cases on termination, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 5390–5391.

Cases referred to

Layar Positif Sdn Bhd v Corporate Spirit Sdn Bhd Suit No S5–22–138 of 2007 (unreported), CA (refd)

Master Strike Sdn Bhd v Sterling Heights Sdn Bhd [2005] 3 MLJ 585; [2005] 2 CLJ 596, CA (refd)

Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd [2000] 2 MLJ 456; [2000] 2 CLJ 236, CA (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92, 94

Appeal from: Civil Suit No S6–22–139 of 2007 (High Court, Kuala Lumpur)

DP Vijandran (S Ramesh and T Selvadurai) (MP Samy & Co) for the appellant. Lam Wai Tze (Lam Wai Tze & Co) for the respondent.

Umi Kalthum JCA:

INTRODUCTION:

[1] This was an appeal by the appellant/defendant against the decision of the learned High Court judge in allowing the respondent's/plaintiff's claim against the appellant/defendant for an injunction and damages as a result of the termination of a sale and purchase agreement dated 10 February 2006 ('SPA') and dismissing the appellant's/defendant's counterclaim for specific performance of the same agreement.

BRIEF FACTS

[2] The appellant and the respondent entered into the SPA for the purchase of a piece of land belonging to the respondent held under Country Lease 075375370, Sungai Melakin, Sandakan, Sabah ('the said property').

[3] The acreage of the said property is 60.47 acres and the agreed purchase price is RM665,170 ('the purchase price').

[4] The respondent had paid RM332,585 to the appellant which was 50% of the purchase price of the said property as deposit and part payment under the SPA.

[5] In accordance with cl 16 of the SPA, the management of the property was to be surrendered to the appellant upon the signing of the agreement. The respondent had duly handed over the management of the said property to the appellant.

[6] Clauses 4(2) and 5 of the SPA stipulated that the balance of the purchase price of the said property was to be paid within three months from the date of the SPA. A one month extension may be allowed, if necessary, subject to a charge of 8% interest per annum.

[7] The appellant however failed and/or refused and/or neglected to pay the balance of the purchase price of the said property. The appellant also had not at

any given time, after the lapse of three months and an additional one month grace period to pay the balance purchase price, sought for an extension of time from the respondent to settle the outstanding sum.

[8] Numerous reminders were given to the appellant via the respondent's solicitor's letters dated 15 June 2006, 5 September 2006, 2 October 2006, 12 October 2006, 13 October 2006, 3 November 2006, 22 November 2006 and 28. November 2006 respectively. The appellant still failed to pay up the balance of the purchase price.

[9] The respondent had on a 'goodwill' basis granted further extension of time until 7 January 2007 for the appellant to pay the balance of the purchase price but the appellant still failed and/or refused and/or neglected to do so.

[10] In an attempt to help the appellant pay off the balance of the purchase price, the respondent, through his brother Chow Kok Cheng ('PW2'), tried to help the appellant to obtain a loan from Bank Pertanian Malaysia but the application was rejected due to the failure of the appellant in providing the relevant documents required for the loan application.

[11] The respondent was left with no choice but to terminate the SPA via a notice of termination and re-delivery of the management dated 8 January 2007.

[12] The said notice was issued to the appellant's solicitors but the appellant refused to re-deliver the management of the said property to the respondent.

[13] The respondent then filed a writ summons claiming for the termination of the SPA, damages and other reliefs on grounds that the appellant failed to pay the balance of the purchase price as stipulated in the SPA.

[14] The appellant in turn filed a counterclaim that the notice of termination issued by the plaintiff was void and had no legal effect and for specific performance of the SPA.

THE APPELLANT'S CASE

[15] The crux of the appellant's appeal lies in the contention that there were three other sale agreements contemporaneously executed by the parties which were intended to be read as one as they form part of one transaction.

[16] In addition to the SPA, the appellant had executed three sale agreements with one Layar Positif Sdn Bhd ('Layar Positif'). The respondent is one of the

directors in Layar Positif and Layar Positif was in the process of acquiring a 516 acres of oil palm land which is adjoining to the respondent's land with the intention to form one single larger estate for the purpose of the appellant's business of running an oil palm estate.

[17] The three sale agreements were also the subject matter of a separate civil suit filed by Layar Positif against the appellant vide Kuala Lumpur High Court Suit No S5–22–138 of 2007 ('said suit').

[18] In the said suit, Layar Positif's and the appellant's claims were premised on similar grounds as to the current appeal. Layar Positif's claim was dismissed and the appellant's counterclaim for specific performance of the three sale agreements was allowed by the High Court and the said decision was then unanimously affirmed by the Court of Appeal.

[19] It is the appellant's contention that it had always been the intention of both the appellant and the respondent to execute the three sale agreements with the SPA contemporaneously. This was done with the knowledge of the respondent. The three sale agreements together with the SPA was signed contemporaneously because the appellant wanted to buy the whole parcel of the land under one transaction.

[20] The payment of 50% deposit of RM3,172,392.15 by cash and bank draft to Layar Positif were also intended to be the deposit money for all the four sale agreements.

[21] The balance of the purchase price of RM332,585 could not have been paid to complete the SPA with the respondent because the other three sale agreements were not ready for completion due to Layar Positif's failure to fulfil the special conditions.

[22] The court must take into consideration all four sale agreements and the reason as to why the balance of the purchase price of the said property was not released by the appellant to the respondent.

THE RESPONDENT'S CASE

[23] The respondent's case was that under cl 4(2) of the SPA the completion date of the SPA was three months from the date of the SPA which was on 9 May 2006.

[24] The appellant did not seek any extension of time under cl 5 of the SPA nor did the appellant seek the enforcement of the memorandum of extension of time to complete the transaction.

[25] The respondent had on his own accord extended the period of the payment of the balance purchase price. Apart from that, the respondent, via his solicitors, had forwarded numerous reminders for the payment of the balance purchase price which remains outstanding.

[26] With regard to the appellant's contention that the purchase of the said property was to be treated as one transaction with the other three sale agreements with Layar Positif was devoid of any proof. The alleged intention was not recorded in the SPA. In addition to that, the appellant alleged the the said property form one estate with the land in the other three sale agreements. The testimonies of PW1 and PW3 clearly showed that Layar Positif's land has its own boundaries, access road and management. That there is no law that states that all documents signed simultaneously must form a single transaction in the circumstances whereby the documents were signed by different legal entity for different properties and are different in their conditions, nature and status.

[27] Based on the above mentioned reasons, the respondent alleged that the notice of termination and re-delivery of the management dated 8 January 2007 was valid.

DECISION OF THE HIGH COURT

[28] The learned trial judge held that the failure of the appellant to pay the balance of the purchase price of the said property within the allotted time was a fundamental breach to the SPA. Such failure accorded the right to the respondent to terminate the SPA and to claim for the interests as stated in cll 4 and 5 of the SPA respectively.

[29] Although the SPA and the three sales agreements were handled by the same solicitors on the same date, the three sale agreements were attached with a special condition whereby the appellant had to make an application for conversion on the use of land to enable the planting of oil palm trees. In the SPA this condition was not applicable.

[30] The only evidence of the appellant in its contention that the transactions were to be treated as one transaction was the assumption by the appellant of the same which was never communicated to the respondent.

[31] The clear language of the SPA did not suggest that parties intended to treat the whole four sale agreements collectively as one transaction.

[32] The appellant also failed to show that the said property's readiness for registration of the transfer to the appellant was still pending like the land in the

other three sale agreements. The learned trial judge found that there were some problems with the land in the three sale agreements and the status of the appellant's financial standing in respect of the three sale agreements to effect the registration of the transfers was not ascertainable.

[33] The learned trial judge found that the failure of the appellant to pay the balance of the purchase price and the absence of any attempt to seek for an extension of time as provided under cl 5 of the SPA spoke volumes of the appellant's standing.

[34] In view of the above, the learned trial judge found that the notice of termination and re-delivery of the management dated 8 January 2007 was valid and the SPA was rightfully terminated. The respondent's claim was therefore allowed with costs and the appellant's counterclaim for specific performance was dismissed by reason of its own breach of the SPA.

THE APPEAL

The agreement ought to be treated as one single transaction with the other three sale agreements

[35] The crux of this appeal laid in the appellant's contention that the SPA ought to be treated as one contemporaneous transaction with the other three sale agreements of land with Layar Positif.

[36] We found that the learned trial judge was correct in her finding that although the SPA and the other three sale agreements were executed simultaneously between Layar Positif and the appellant, they do not form as one single transaction. The SPA was entered into by the respondent and the appellant whereas the other three sale agreements were entered into between the appellant and Layar Positif. It is trite law that the respondent and Layar Positif are different legal entities. Just because the respondent is a director of Layar Positif it does not mean that the respondent's said property is that of Layar Positif's and vice versa so as to point to one contemporaneous transaction. That would lead to a travesty of the law. Further, the four agreements are for different properties; 29 parcels of land held under 29 separate titles whereby the nature, condition and status of the 29 parcels of land owned by Layar Positif are different from the said property.

[37] The said property is free from any encumbrances and had been delivered to the appellant's solicitors upon the execution of the SPA on 5 January 2006. Meanwhile the land under the three sale agreements were attached with special condition for the conversion of land use and most of the titles were charged to Bank Pertanian Malaysia.

[38] The learned trial judge was correct in invoking ss 91, 92 and 94 of the Evidence Act 1950 in that no evidence should be given to prove the terms of the contract except the document itself so as not to accept the appellant's contention that the SPA formed one single transaction with the three sale agreements.

[39] We referred to the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 where the Federal Court held, at p 233, paras B–F, left, that:

> ... Section 92 specifically excludes evidence to contradict, vary, add to or subtract from any of the terms of a contract in writing, except in any of the situations spelled out in the provisos thereto: ...
>
> It is not the case of the respondent that any of the provisos to s 92, except possibly proviso (a) applies. Its contention therefore for the admission of the parol evidence which won the approval of the learned judge was that not all the terms had been incorporated in the agreement. If this contention so generally stated and understood had any foundation at law, then it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law. I think and I say so with respect, the fundamental mistake made by the learned judge is to conclude simply and without qualification that s 92 applies only to a case where all the terms of the agreement have been reduced to writing. But that is not what s 92 says. It merely says 'where the terms.' and by referring back to s 91, it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, inter alia, add new terms to it.

[40] We were of the view that the SPA could not be viewed to form a single transaction with the other three sale agreements. Had the SPA was intended to be viewed as one single transaction encompassing all four sale agreements, it would surely have been easily and expressly reflected in the SPA. The absence of such references to the three sale agreements in the SPA only served to prove that it was never the intention of the parties to treat them as contemporaneous and as one single transaction. The appellant's contention to treat them as one transaction was prohibited by virtue of ss 91, 92 and 94 of the Evidence Act 1950.

[41] It was significant to us that the appellant did try to gain mileage from the results of the said S5–22–138 of 2007 (see paras 17 and 18 above) in respect of this suit number S6–22–139 of 2007. However, it appeared that the

appellant did make an application in this suit number S6–22–139 of 2007 to consolidate both suits. That application was dismissed by the High Court judge (see order, p 4, *rekod rayuan tambahan lanjut kedua*). On appeal to this court, the appellant had withdrawn its appeal. So the outcome of the said suit should not have any bearing on this suit/this appeal. The grounds of judgment of the learned High Court judge (on pp 6–10 of the some appeal record) in dismissing that application seemed to take into account similar reasons as our reasons for finding that there was no one transaction contemplated by the parties in respect of the SPA and the three sale agreements.

Breach of the fundamental term of the agreement

[42] We found that the failure of the appellant in paying the balance of the purchase price of the said property in accordance with the SPA tantamounted to a fundamental breach of the SPA. The aforesaid failure of the appellant entitled the respondent, as the vendor, to terminate the SPA. We referred to the case of *Master Strike Sdn Bhd v Sterling Heights Sdn Bhd* [2005] 3 MLJ 585; [2005] 2 CLJ 596 which laid down the principle that any breach for non-payment of the purchase price shall go to the root of the agreement rendering the agreement terminated and the deposit forfeited. Per Nik Hashim JCA (as he then was) at p 612, paras d-g:

> The obligation to pay the purchase price is a fundamental obligation. The Court of Appeal in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675; [1997] 1 CLJ 287:
>
> > In the absence of any special considerations in a contract for the sale of land, the obligation to pay the purchase price is fundamental.
>
> Thus, any breach for non payment of the purchase price shall go to the root of the agreement thereby rendering the agreement terminated and the deposit forfeited (*Siah Kwee Mow & Anor v. Kulim Rubber Plantations Ltd* [1979] 2 MLJ 190). In the instant case, where time was stipulated as of the essence, the respondent was entitled to forfeit the deposit on account of the appellant's breach to pay the balance of purchase price on time. (see *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711; [1987] 2 CLJ 423; [1987] CLJ (Rep) 345.
>
> It is therefore irrelevant in the present case how the appellant made its arrangements to pay the purchase price. The purchase price must be paid on schedule ...

[43] The SPA was rightfully terminated as the appellant had failed to fulfil his side of the bargain which was to pay the balance of the purchase price within the time stipulated in cl 4(2) of the SPA and despite several reminders. Moreover, under cl 22 time wherever mentioned in the SPA shall be of the essence of the SPA.

[44] Although it was provided so in the SPA, the appellant did not seek for any extension of time under cl 5 of the agreement. It was the respondent himself who on his own volition further extended the time for the payment to be made until 8 July 2007.

[45] It was clear to us that the respondent was entitled to terminate the SPA in accordance with cl 9 of the SPA as the appellant had failed to pay the balance of the purchase price and the respondent was rightfully entitled to forfeit the 10% deposit under the SPA and deduct a sum of RM2,600 per acre as the reimbursement for loss of profit and claim for compensation and/or damages for any damage on the said property incurred as a result of the delivery of the management of the said property from the respondent to the appellant.

[46] We were also of the opinion that the respondent was legally entitled to exercise his rights under cll 9 and 16 of the SPA to repossess the said property and to charge the appellant late payment interest of 8%pa. The respondent was also entitled to claim for compensation and damages for any losses incurred as allowed by the learned trial judge.

The appellant's counterclaim

[47] It is trite law that in seeking for an equitable relief such as specific performance, one must first fulfil one's obligation, if any. The fundamental breach of the appellant in failing to pay the balance of the purchase price as per the SPA must consequently render his counterclaim for a specific performance to fail (see *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-operative Housing Society Ltd* [2000] 2 MLJ 456; [2000] 2 CLJ 236 .

CONCLUSION

[48] Based on the aforesaid reasons, we found that there was no merit in the appellant's appeal and it was the unanimous decision of this court to dismiss the appellant's appeal with costs of RM20,000. The decision of the High Court was affirmed. Deposit was to be refunded.

Appellant's appeal dismissed with costs of RM20,000; decision of High Court affirmed.

Reported by Dzulqarnain Ab Fatar